RALPH MEMMOTT

IBLA 81-639 Decided January 6, 1982

Appeal from decision of the Utah State Office, Bureau of Land Management, declaring the Washboard No. 9 and Colored Hills No. 9 mining claims null and void ab initio, in part.

Affirmed.

1. Act of November 9, 1921--Mining Claims: Lands Subject to--Rights-of-Way: Federal Highway Act

   A mining claim located on lands subject to a valid, ongoing, and pre-existing material site granted pursuant to the Federal Highway Act of November 9, 1921, 23 U.S.C. § 18 (1946), now the Federal Aid Highway Act, 23 U.S.C. § 317 (1976), is null and void ab initio.

2. Mining Claims: Lands Subject to

   Land which has been patented without a reservation of minerals to the United States is not available for the location of mining claims, and mining claims located on such land after it is patented are null and void ab initio.

APPEARANCES: Ralph Memmott, pro se.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Ralph Memmott 1/ appeals from a decision of the Utah State Office, Bureau of Land Management (BLM), dated April 8, 1981, declaring portions of the Washboard No. 9 and the Colored Hills No. 9 mining

1/ The notices of location and the State Office decision indicate that there were several other locators for these claims. Ralph Memmott is the only one appealing the decision.

claims null and void ab initio. The Washboard No. 9 claim, situated in the W 1/2 E 1/2 sec. 14, T. 16 S., R. 2 W., Salt Lake meridian, was located on March 20, 1961. The Colored Hills No. 9 claim was located on December 15, 1960, for the SE 1/4 sec. 33, T. 16 S., R. 2 W., Salt Lake meridian.

In its decision BLM declared that part of the Washboard No. 9 claim located in the NW 1/4 SE 1/4 sec. 14, T. 16 S., R. 2 W., Salt Lake meridian null and void because that land "was granted to the State of Utah as a material site on March 11, 1947, pursuant to 23 U.S.C. § 317, 1964." On appeal appellant asserts that he cannot understand how a material site could be granted pursuant to a law passed "16 years" after the material site application was granted. Appellant's confusion apparently stems from BLM's citation of the 1964 edition of the United States Code. However, the date of the United States Code is not necessarily indicative of the date of passage of a particular Act. 2/ The applicable statute herein, the Federal Highway Act, was enacted November 9, 1921, 42 Stat. 212.

On March 11, 1947, the Utah State Road Commission was granted a right-of-way (SL 066225) to use the NW 1/4 SE 1/4 sec. 14 as a source for road building materials pursuant to section 17 of the Federal Highway Act, 42 Stat. 216. At that time the proper citation to the United States Code for section 17 was 23 U.S.C. § 18 (1946). 3/ 23 U.S.C. § 18 was codified in the 1964 United States Code at 23 U.S.C. § 317(a), (b), and (c). Therefore, BLM granted the materials application in accordance with law 14 years prior to the location of the Washboard No. 9 claim in 1961.

[1] It is well established that material site rights-of-way created under this provision of law effectively withdraw the lands affected from entry and location under the mining law. James F. Pepcorn, 50 IBLA 414 (1980); Sam D. Rawson, 61 I.D. 255 (1953); see United States v. Johnson, 39 IBLA 337, 372 (1979).

Appellant also asserts that the "Federal Highway Right of Way Act provides that proof of construction (use) on a Federal Aid Highway Right of Way must be submitted within ten years of grant or grant is canceled."

Section 113 of the Federal Aid Highway Act of 1973, 23 U.S.C. § 108(a) (1976), provides that proof of construction on the right-of-way must be submitted within a period not exceeding 10 years following the

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2/ In this case the proper citation to the United States Code would have been to the 1976 edition, not 1964.

3/ Title 23 was subsequently revised, codified, and enacted into positive law by P.L. 85-767, section 1, Aug. 27, 1958, 72 Stat. 885.

fiscal year in which the request for the right-of-way is made, unless a longer period is determined to be reasonable by the Secretary of Transportation. 4/ In a decision dated May 5, 1978, BLM required the Utah Department of Transportation, through the Federal Highway Administration, to submit proof of use on SL 066225. BLM stated that "[s]ection 113 of the Federal Aid Highway Act of 1973 provides that proof of construction (use) on Federal Aid Highway right-of-way must be submitted within 10 years of the date of the grant." On February 4, 1980, the U.S. Department of Transportation forwarded to BLM an executed proof of construction (proof of use) for SL 066225, executed by officials of the Utah Department of Transportation. The officials stated that use of the site was commenced in August 1946 and continued to the present. By decision dated February 15, 1980, BLM accepted the proof of use. There is no provision in 23 U.S.C. § 108 (1976), as amended, for automatic termination of a grant for which the necessary proof is not submitted timely and, in fact, the statute now provides that the Secretary of Transportation may extend the time. However, regardless of when proof of use was required to be filed or when it was, in fact, filed the right-of-way clearly was of record at the time the claim in question was located. Therefore, regardless of the status of the right-of-way, that part of the claim located on the right-of-way was null and void ab initio. See John C. Thomas (On Reconsideration), 59 IBLA 364 (1981).

BLM declared that part of the Washboard No. 9 claim encompassing the W 1/2 NE 1/4 sec. 14, T. 16 S., R. 2 W., Salt Lake meridian, null and void ab initio because the land was patented to the State of Utah on June 2, 1903, pursuant to 28 Stat. 107. Also, BLM declared that part of the Colored Hills No. 9 claim in SW 1/4 SE 1/4 sec. 33, T. 16 S., R. 2 W., Salt Lake meridian, null and void ab initio because it was patented out of Federal ownership (including all minerals) on September 14, 1926, pursuant to the provisions of the Act of May 20, 1862.

[2] Mining claims may only be located on lands open to the operation of the United States mining laws. Land which has been conveyed to a state or an individual without a mineral reservation to the United States is not available for the location of a mining claim. Mining claims located on such land after it is so patented are null and void ab initio. 5/ Ariel C. MacDonald, 52 IBLA 384 (1981); Don P. Smith, 51 IBLA 71 (1980); Jonathan Carr, 49 IBLA 17 (1980).

4/ Section 110(a) of the Federal Highway Act of 1956, 23 U.S.C. § 108(a) (1958), provided for a 5-year period in which to commence construction. This period was increased to 7 years by a 1959 amendment (P.L. 86-36) and then to 10 years by the Federal Aid Highway Act of 1973, 87 Stat. 257.

5/ Inasmuch as these are placer claims, we need not examine the question whether it is permissible, for the purpose of acquiring extralateral rights to a lode deposit, to enter patented or withdrawn land for the purpose of fixing parallel end lines. But see The Hidee Gold Mining Co., 30 L.D. 420 (1901).

The case file for the Washboard No. 9 claim contains a copy of the instrument dated June 2, 1903, which conveyed the lands in question to the State of Utah. 6/ The case file for the Colored Hills No. 9 claim includes Patent No. 985213, dated September 14, 1926, which certifies that the land in issue was conveyed to Daniel Johnson as a homestead pursuant to the Act of May 20, 1862. There is no mention in either document that the United States reserved the mineral rights. Appellant has submitted no evidence that there was such a reservation.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Bruce R. Harris
Administrative Judge

We concur:

James L. Burski
Administrative Judge

C. Randall Grant, Jr.
Administrative Judge

6/ The instrument states that the lands were selected by the State for the establishment of permanent reservoirs for irrigation purposes.